Supreme Court, U.S.
FILED
DEC 22 1995
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(4)

No. 95-865

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA,

Petitioner,

v.

WINSTAR CORPORATION, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF GLENDALE FEDERAL BANK, FSB IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

CARTER G. PHILLIPS
RICHARD D. BERNSTEIN
Sidley & Austin
1722 I Street, N.W.
Washington, D.C. 20006
(202) 736-8000

JERRY STOUCK*
JOE G. HOLLINGSWORTH
DONALD W. FOWLER
Spriggs & Hollingsworth
1350 I Street, N.W.
Ninth Floor
Washington, D.C. 20005
(202) 898-5800

Attorneys for Respondent
Glendale Federal Bank, FSB

* Counsel of Record

December 22, 1995

Balmar Legal Publishing Department, Washington, D.C. (202) 682-9800

37 pp

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held, based on its fact-bound review of the pertinent contract documents and other evidence, that the government and Glendale Federal Bank, FSB had contractually agreed in unmistakable terms that Glendale could include as capital a goodwill asset, amortizable over 40 years, that was essential to make Glendale's merger with a failing thrift financially possible for both Glendale and the government, thereby saving the government more than $783 million in thrift liquidation costs?

2. Whether the Court of Appeals correctly held that the FSLIC was empowered to enter into the contract with Glendale based on its then-existing express statutory authority "[t]o make contracts," 12 U.S.C. § 1725(c)(3)(1989) (repealed 1989)?

3. Whether the Court of Appeals correctly held that the government could not avoid monetary liability for breach of its own contract following enactment of a statute that was plainly intended to, and did, render the government's own performance impossible?

RULE 29.6 STATEMENT

Respondent Glendale Federal Bank, FSB has no parent or subsidiary companies (other than wholly owned subsidiaries).

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Respondent Glendale Federal Bank, FSB, hereby opposes the petition of the United States for a writ of certiorari to review the decision of the United States Court of Appeals for the Federal Circuit, sitting *en banc*, in this case.

STATEMENT

This case involves nothing more than a routine, fact-based dispute concerning particular government contracts. In the decisions below, first the Court of Federal Claims and then the United States Court of Appeals for the Federal Circuit, in a 9-2 *en banc* decision, found that in 1981 Glendale Federal Bank and the government entered into a contract by which Glendale agreed to assume by merger the government's deposit insurance

liabilities for a failing thrift and the government agreed in return to Glendale's treating as capital, amortized over 40 years, the $734 million in goodwill generated by the transaction. Pet. App. 8a-9a. The courts below found that the United States breached that contract when in 1989, following Glendale's full performance and while retaining more than $783 million in benefits it received from Glendale's performance, the government repudiated its contractual commitment and required Glendale to deduct more than $550 million in remaining goodwill from its capital accounts. *Id.* at 9a, 29a-30a, 119a-120a.

In concluding that the government was answerable in damages or restitution for its breach of contract, the courts below applied straightforward and longstanding principles of contract law. The government's petition sets forth no compelling reason for this Court to involve itself with what is essentially a dispute about matters of contract interpretation. Because the petition makes such extravagant and unfounded claims about the questions presented by the holdings below and gives such a one-sided description of the proceedings, a somewhat longer than customary statement of the case is necessary.

1. The government's petition wholly ignores the most important federal role with respect to this case: that of deposit insurance provider. The National Housing Act of 1934, Pub. L. No. 73-479, 48 Stat. 1246 (codified as amended at 12 U.S.C. § 1701, *et seq.* (1989)) created the Federal Savings and Loan Insurance Corporation ("FSLIC") to insure the deposit accounts of federally-chartered thrifts, upon payment of premiums and other costs. 12 U.S.C. §§ 1724 *et seq.* (1989) (repealed 1989). The Act gave FSLIC broad authority to protect the interests of the insurance fund, including the authority, upon default of an insured thrift, to take over and operate the association, to liquidate it, to merge it with another insured institution, and to take other appropriate actions, including providing financial assistance to the defaulting institution or to another institution to

facilitate a merger. *Id.* §§ 1729(b)-(f).[1] The contract between Glendale and the government arose in, and must be understood in, that context.

2. During the late 1970's and early 1980's, rampant inflation and correspondingly high interest rates caused an unprecedented and accelerating number of thrift institutions to fail. Pet. App. 4a-5a. These failures in turn presented a crisis for FSLIC, whose "deposit insurance liabilities . . . threatened to exhaust its insurance fund." *Id.* at 5a. In response, "[a]s an alternative to liquidating failed thrifts and expending the FSLIC insurance funds," the FSLIC and its operating head, the Federal Home Loan Bank Board ("Bank Board"), "encouraged healthy thrifts to merge with the failing ones." *Id.* Because the failing thrifts were by definition insolvent, "direct assistance and other incentives" from the government were "necessary for the healthy thrifts to maintain their financial well-being after the mergers." *Id.* The options available to the government included cash assistance, which FSLIC had provided to facilitate earlier mergers; however, in light of the large number of failing institutions, the insurance fund could no more afford cash-assisted mergers than it could the cost of paying off the depositors in liquidations. Accordingly, FSLIC opted instead to offer non-cash assistance and incentives. *Id.*

Among the incentives offered by FSLIC and the Bank Board was goodwill, an intangible asset resulting from the use of purchase method accounting in the mergers. *Id.* Under that accounting method, the amount by which the fair value of a failing thrift's liabilities exceeded the value of its assets was first determined. The acquiring thrift then was permitted to book goodwill in that amount as an asset includable in capital, which

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[1] Among the powers granted FSLIC to carry out its responsibilities, specifically, was the power "[t]o make contracts." 12 U.S.C. § 1725(c)(3).

could be amortized over time.[2] In short, as the Federal Circuit explained, goodwill was a substitute for cash from the federal government; goodwill thus "permitted the healthy thrift to assume the deposit liabilities of the failing thrift and to maintain capital compliance without having to put up large amounts of its own money and *without requiring large amounts of monetary assistance from the government*." *Id.* at 6a (emphasis added).

Use of goodwill allowed FSLIC to avoid having to pay out on its deposit insurance liabilities, thereby saving the government enormous amounts of money. As former Bank Board Chairman Richard Pratt testified to Congress:

> The Bank Board was caught between a rock and a hard place. While it did not have sufficient resources to close all insolvent institutions, at the same time, it had to consolidate the industry, move weaker institutions into stronger hands and do everything possible to minimize losses during the transition period. *Goodwill was an indispensable tool in performing this task.* . . . It facilitated mergers without incurring the inordinant [sic] cash costs associated with liquidating institutions during the most unfavorable cyclical peak in American economic history.

Savings and Loan Policies in the Late 1970s and 1980s: Hearings Before the House Comm. on Banking, Finance and Urban

[2] Purchase method accounting is a generally accepted accounting principle, pursuant to which the excess of the purchase price over the fair value of net assets acquired in a merger is booked as goodwill, an intangible asset that is then amortized over a period of years. Pet. App. 6a. In a FSLIC-assisted acquisition, such as the one at issue in Glendale's case, the "purchase price" paid by the healthy thrift was its assumption of the failing thrift's liabilities. The excess of those liabilities over the failing thrift's assets was thus considered goodwill which the acquiring institution could book as an intangible asset included in capital and amortize. *Id.* In effect, goodwill functioned much like a long-term loan, which the thrift would repay over time by replacing the gradually-amortizing goodwill with cash generated through earnings.

Affairs, 101st Cong., 2d Sess. 176, at 227 (1990) (emphasis added), *quoted in* Pet. App. 7a.

3. In 1981, Glendale was approached about merging with First Federal Savings and Loan Association of Broward County ("Broward"). Pet. App. 8a. Broward then had liabilities that exceeded the fair value of its assets by $734 million, *id.*, and the government projected that Broward soon would fail. Because of its deposit insurance obligations, the government faced a huge impending liability and, unless some alternative was found, expected to incur real cash costs to liquidate Broward of $783 million, by its own estimate. C.A. App. 1802.[3]

Glendale was then (and always had been) both profitable and in comfortable compliance with regulatory capital requirements. Pet. App. 8a. Even so, its own capital of $277 million was inadequate -- by hundreds of millions of dollars -- to absorb Broward's capital deficiency. Glendale, therefore, could not even consider such a merger unless the government provided sufficient consideration to offset Broward's crippling excess liabilities. *See id.* at 22a n.5. In ordinary circumstances, that consideration would have included a significant cash infusion. But the insurance fund was sufficiently depleted that the government could not do so.

As an alternative to a government cash payment, the government's consideration was provided instead by its agreement to purchase method accounting and 40-year amortization for goodwill. Under that approach, Glendale would book goodwill in the amount of $734 million, which would be included in Glendale's capital and amortized over a 40-year period. That asset would thus offset Broward's excess liabilities for a suffi-

[3] In fact, the immediate cash demand would have been much greater. The government projected that liquidating Broward would require an initial cash outlay of $1.8 billion to satisfy deposit insurance claims and that later sales of Broward's loans and other assets would return only about $1 billion of that expenditure. C.A. App. 1643, 1802.

cient period to permit Glendale to fill Broward's capital deficit through earnings.[4]

"After lengthy negotiations over the terms and conditions," *id.* at 8a, Glendale, FSLIC and the Bank Board executed the final contract documents on November 19, 1981. Effective at closing, Glendale booked the $734 million of agreed-upon goodwill to offset Broward's negative net worth of $734 million, *id.* at 9a, and thereafter Glendale began to amortize the goodwill on the schedules agreed upon with FSLIC and the Bank Board, *id.* at 20a-21a.

By this agreement the government was able, without payment of any cash, effectively to transfer its insurance exposure to Broward's $734 million in excess liabilities onto Glendale's books and thereby to avoid the even larger cash cost of liquidating Broward. FSLIC's Director concluded at the time: "I don't think we'll ever see a deal like this one again in terms of its benefit to the FSLIC. . . ." C.A. App. 1643. The Bank Board Chairman concurred: "the solution which FSLIC has found is one which appears to *save the people of the United States . . . approximat[ely] three quarters of a billion dollars*." *Id.* at 1656 (emphasis added).

Following the Broward merger, Glendale fully performed all of its contractual obligations to the government, including assuming Broward's excess liabilities and making additional cash payments to FSLIC of more than $18 million pursuant to unrelated contract terms. *See* Pet. App. 119a n.8. For the first

[4] Under FSLIC's deposit insurance requirements, thrifts were required to maintain minimum capital reserves, expressed as a percentage of assets. *See* Pet. App. 4a. The larger a thrift's capital reserves, the greater the amount of income-earning assets it could hold. For that reason, Glendale's right to treat the Broward merger goodwill as capital was critical both to its compliance with minimum capital requirements and to its ability to acquire and hold a sufficient volume of assets whose earnings would then be used over time to replace the gradually-amortizing goodwill with tangible capital.

eight years following the parties' agreement, the government likewise honored its commitments concerning goodwill and its amortization. Because of that fact, and only because of that fact, Glendale was able to prosper and to nurse Broward's operations back to health.

4. In the late 1980's, the government began to rethink its earlier contract commitments with respect to goodwill, in large part based on the failure and liquidation of a number of merged institutions and on its desire to increase the amount of hard capital that stood between it and potential demands on its deposit insurance fund.[5] The result was the Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (codified at 12 U.S.C. § 1464, *et seq.* (1989)) ("FIRREA"), which became law on August 9, 1989. Capital regulations adopted pursuant to FIRREA now required Glendale to "deduct" goodwill that had arisen out of the Broward merger (termed "supervisory goodwill") from its capital accounts. *See* 12 C.F.R. §§ 567.5(a)(2), 567.9(c) (1989). The government thus squarely repudiated the central contractual commitment it had made with respect to goodwill in its agreement with Glendale. Having used the "indispensable tool" of goodwill in 1981 to induce Glendale's agreement to take on Broward's excess liabilities, the government in 1989 repudiated its own promises and deprived Glendale of the contracted-for consideration, while at the same time retaining the $783 million benefit of Glendale's performance.

The government's repudiation required Glendale to deduct from its regulatory capital all of the more than $550 million of remaining, unamortized goodwill promised in its contract with

[5] When a thrift is liquidated, goodwill does not reduce the losses to the government's insurance fund; only cash does. Thus, as the Federal Circuit observed, "the undisputed reason for limiting the use of the supervisory goodwill was precisely the reason the government used it in the first place -- it is a money equivalent, not money." Pet. App. 45a.

the government, forcing Glendale either to replace the lost capital with cash or to reduce dramatically its earning assets, or both, in order to avoid regulatory seizure itself. *See* Pet. App. 119a-120a. Glendale fell out of regulatory capital compliance for the first time in its history and came within weeks of seizure and liquidation. *Id.* at 14a.

After restructuring its operations and divesting billions of dollars of income-producing assets in an effort to return to capital compliance, Glendale narrowly avoided seizure only by raising more than $450 million of private capital (which partially re-filled the capital deficit that the government's contractual breach had created on *Glendale's* books). In the process, the government neatly transferred the cost of resolving the Broward problem from its own insurance fund to Glendale, saving itself more than three-quarters of a billion dollars in 1981 dollars and causing severe -- and continuing -- adverse effects on Glendale's operations and profits.

5. In 1990 Glendale filed suit against the United States in the Court of Federal Claims, seeking damages based on contract and constitutional taking theories. In a 1992 ruling granting Glendale's motion for partial summary judgment on liability, the court held that the government had an "express contract" with Glendale which "called for the use of the purchase method of accounting and the amortization of an intangible supervisory goodwill asset over . . . forty years," *id.* at 119a; that the government had breached the contract, *id.*at 125a-132a; and that "[t]he government, therefore, is liable to Glendale for damages or restitution," *id.* at 132a. The court then consolidated Glendale's case with the *Winstar* and *Statesman* cases and certified its rulings for interlocutory appeal. *Id.* at 151a-152a.

6. A split panel of the Federal Circuit initially reversed; the full court, however, agreed to rehear the case *en banc* and ordered the panel decision vacated and withdrawn. *Id.* at 105a. The Federal Circuit then affirmed the trial court's breach of

contract rulings by a vote of 9-2. After a "*de novo*" review of the contract documents, the Federal Circuit "agree[d]" with the Court of Federal Claims that "the government had an *express contractual obligation* to permit Glendale to count the supervisory goodwill generated [in] its merger with Broward as a capital asset for regulatory purposes" and "to amortize the major portion of that goodwill . . . for a period of 40 years. . . ." *Id.* at 17a (emphasis added). As the Federal Circuit explained, "[i]t is *clear* from the documents that this was the intent of the parties." *Id.* at 22a (emphasis added).[6]

The Federal Circuit found the parties' clear contractual intent confirmed by the financial facts and circumstances leading to the transaction, including the fact that, if the offsetting $734 million of goodwill had not counted as a capital asset, Glendale -- a "healthy, fully capitalized thrift" *before* the Broward merger -- would have had a net worth immediately *following* the merger of *negative* $460 million. *Id.* at 22a n.5. Absent the government's contractual goodwill commitments, then, Glendale "would have been subject to regulatory noncompliance and penalties from the moment" it merged with Broward, thereby "resulting in the losses the FSLIC sought to avoid." *Id.* at 22a. As the Federal Circuit emphasized, "no healthy thrift would consummate a transaction that immediately put it in regulatory noncompliance." *Id.*[7]

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[6] The Federal Circuit found, as had the trial court, *see* Pet. App. 115a-116a, that the integration clause of Glendale's agreement expressly incorporated "any resolutions or letters issued contemporaneously by the [Bank Board] or the FSLIC," and, thus, all such "contemporaneous documents . . . collectively constituted the 'Agreement' of the parties." *Id.* at 17a, 21a.

[7] The Federal Circuit rejected, as had the Court of Federal Claims, the government's arguments that wording in Glendale's contract expressly reserved to the government the right to impose materially different regulatory capital requirements. Pet. App. 23a-24a. In fact, as the Court of Federal Claims emphasized, Glendale's contract provided expressly that "[n]o subsequent modification or termination of this Agreement shall be binding unless set forth in writing and executed by the parties or their proper

The Federal Circuit also agreed that there was "little question that the application of FIRREA and the regulations thereunder to deny or restrict plaintiffs' contractual rights to use supervisory goodwill with the associated amortization periods . . . was a breach of FSLIC's and the Bank Board's agreement[]" with Glendale. *Id.* at 29a. The court held that once Glendale performed its obligations under the contract, "the government's contractual obligations became effective." *Id.* at 30a. "Failure to perform a contractual duty when it is due is a breach of contract." *Id.* (citing *Restatement (Second) of Contracts* § 235(2) (1981)).

Finally, the Federal Circuit rejected the government's "unmistakability doctrine" and "sovereign acts" arguments, adopting the substance of the analysis of the Court of Federal Claims on each of these points. Pet. App. 31a-45a. The court of appeals reasoned that the government's "sovereign power to legislate" is not at issue in this case because "Congress was always free to deem supervisory goodwill a bad idea and legislate it out of existence." *Id.* at 38a. However, "[w]here that legislation breached the government's prior contractual obligations . . . , the government remains liable in money damages for the breach." *Id.* The Federal Circuit also held that the sovereign acts defense is inapplicable in this case, under well-established precedent, since the "very purpose" of the "pertinent sections of FIRREA at issue here" was "to take away plaintiffs' rights to use supervisory goodwill because Congress felt its use was no longer good policy." *Id.* at 41a.[8]

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successors." *Id.* at 132a n.10; *see also id.* at 23a ("the contract could not be changed except by mutual consent"). No modification of the government's goodwill commitment was ever entered into.

[8] In dissent Judge Lourie argued that sovereign acts principles precluded Glendale's recovery for breach of contract. Pet. App. 49a. Even Judge Lourie agreed, however, that "the government had a contractual obligation to permit the thrifts to count goodwill as regulatory capital and to accept the particular amortization periods" and that Congress "deni[ed] . . . those contractual rights in its enactment of FIRREA." *Id.* The other dissenter, Judge Nies, likewise agreed that Glendale and the government had agreed on the use of purchase method accounting but concluded that to create enforceable rights that survived legislative change the contract had to have, but did not, a second explicit promise by FSLIC "to pay [damages] if Congress decided to step in and do away with" purchase method accounting. *Id.* at 47a-48a. As explained *infra*, n.12, the government's petition does not advance this "second-promise" theory.

REASONS FOR DENYING THE PETITION

This is, at heart, a straightforward government contract case. It has been correctly analyzed and decided by the Federal Circuit, sitting *en banc*, and before that by the Court of Federal Claims. The petition for a writ of certiorari does not identify any legal issue warranting further review.

1. The United States first asserts that review is warranted to consider whether the "unmistakable terms" requirement for federal government contracts is "applicable in a breach of contract action where the plaintiff seeks money damages but not injunctive relief." Pet. (I). That question, however, is *not* presented in this case. While it is true that Glendale's contract claims seek only monetary relief -- and that fact is important in considering some of the government's arguments -- it is undeniable that both the Court of Federal Claims and the Federal Circuit specifically found that Glendale obtained a clearly expressed and "unmistakable" contract right to use and amortize goodwill in the agreed manner. Accordingly, the government's predicate contention that the Federal Circuit "declined to apply the unmistakability doctrine in this case," *id.* at 15, is simply untrue. The propriety of a refusal to apply the unmistakability rule is, therefore, not properly presented for decision.

a. The government describes the unmistakability doctrine as a rule "pursuant to which contractual promises by the government to exercise its regulatory authority in a certain way will be found only if expressed in unmistakable terms." *Id.* at 11. That rule is *precisely* the standard applied by the courts

below in this case. As the Federal Circuit explained, quoting the trial court, "in . . . the instant cases, there has been little serious dispute that the government granted the acquiring thrifts, *in the clearest possible terms*, the right to certain types of regulatory capital treatment." Pet. App. 36a (emphasis added); *see also id.* at 137a ("FHLBB and FSLIC *unmistakably* contracted with [plaintiffs] regarding the use of supervisory goodwill") (emphasis added)). Thus, contrary to the government's arguments, the Federal Circuit agreed that the government's contractual promise regarding the treatment and amortization of goodwill was "unmistakably" expressed.

In arriving at this conclusion, the Federal Circuit applied basic and long-established contract interpretation principles. It is fundamental in contract law that the intention of the parties controls the meaning of a contract. 4 S. Williston, A Treatise on the Law of Contracts § 601 (3d Ed. 1961) ("cardinal principle"). Moreover, this Court has long held that "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Lynch v. United States*, 292 U.S. 571, 579 (1934); *accord Perry v. United States*, 294 U.S. 330 (1935). As the Federal Circuit recognized, its decision in this case is "consistent with [this] long standing precedent." Pet. App. 46a. Indeed, it emphasized that "[t]here is nothing extraordinary about the contracts in these cases. . . ." *Id.* at 45a. *See also id.* at 187a (case presents "garden variety question of whether a contract . . . existed").

Based on its review of "all of the contemporaneous documents" and "supported by other evidence and by the circumstances surrounding the transaction," *id.* at 21a, 22a, the Federal Circuit concluded (as had the trial court) that the government had expressly agreed in its written contract with Glendale that Glendale could include goodwill in its capital for a specified number of years. The Federal Circuit found it "*clear* from the

documents that this was the *intent* of the parties." *Id.* at 22a (emphasis added). There is simply no reason for this Court to engage in the fact-bound process of determining whether the courts below correctly parsed the particular documents and correctly analyzed the other contract evidence in finding the parties' "unmistakable" intent embodied in their agreements.

b. The Federal Circuit's (and the Court of Federal Claims') application of the unmistakability principle in this case is fully consistent with this Court's precedents, including the three decisions cited by the government. Pet. 14-15. In those cases, this Court rejected contract-based claims against the government because it found that the claimed contract rights did not exist -- in any form, much less in "unmistakable" terms.

In *Bowen v. Public Agencies Opposed to Social Sec. Entrapment*, 477 U.S. 41 (1986) ("*POSSE*"), California challenged an amendment to the Social Security Act which revoked the states' then-existing option, reflected in standard-form participation agreements, to withdraw from the federal social security program. In refusing to enjoin the statutory amendment, the Court construed the participation agreements so as not "effectively to forbid Congress to amend a provision of the Social Security Act." *Id.* at 52. The Court in *POSSE* expressly reaffirmed that "the Federal Government, as sovereign, has the power to enter contracts that confer vested rights, and the concomitant duty to honor those rights." *Id.* (citing *Perry* and *Lynch*). However, the Court found that the term of the form participation agreements that was legislatively modified contained no indicia of *contract* rights -- it "was not unique to this Agreement; nor was it a term over which the State had any bargaining power or for which the State provided independent consideration." *Id.* at 55. Instead, "the provision simply was part of a regulatory program" which Congress by statute had expressly "retained the authority to amend." *Id.* Thus, *POSSE*

-- in contrast to this case -- simply did not involve any "unmistakable" contract rights.[9]

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), involved the Tribe's imposition of a tax on oil and gas extracted pursuant to certain leases, the terms of which were completely *silent* regarding taxation of the minerals. As the Court observed, "[t]he severance tax, in contrast [to the lease royalties paid for the oil and gas], is petitioners' contribution 'to the general cost of providing governmental services.'" *Id.* at 138. The Court thus held that imposition of the tax contravened no clear or "unmistakable" contract right, since "the absence of a reference to the tax in the leases themselves hardly impairs the Tribe's authority to impose the tax." *Id.* at 147.

Similarly, *United States v. Cherokee Nation*, 480 U.S. 700 (1987), involved construction of a treaty pursuant to which the Tribe claimed that the federal government had conveyed away its navigational servitude. Noting that such an interpretation of the treaty would be "wholly extraordinary" under well-established law concerning the meaning of the federal servitude, the Court also observed that, in a prior case involving the same treaty, the Tribe had *conceded* that "nothing in the conveyance of title . . . conflicts with the power of the Government [concerning] navigation." *Id.* at 706. In those circumstances, the Court's holding that the treaty did not, in fact, convey away the federal servitude also infringed no "unmistakable" contract right of the Tribe.

In contrast to the Court's construction of the various agreements and treaties in *POSSE*, *Merrion* and *Cherokee Nation*, in this case the Federal Circuit concluded from the record evidence

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[9] *See* Pet. App. 34a ("The 'rights' at issue in *POSSE*, then, were solely government-created. . . . At any time, the government could revoke them *without legal consequence* because the plaintiffs had not bargained for their creation.").

that the government's contract with Glendale did promise, "in the clearest possible terms," the right to include goodwill in capital and to amortize it over the agreed periods. Pet. App. 36a. The Federal Circuit's holding regarding the clarity of the government's "express contractual obligation" to Glendale is completely faithful to the unmistakability principles set forth in this Court's precedents, is fully supported by the contract evidence and warrants no further review here. *Id.* at 17a.

c. Nor is the government correct in its claim that the Federal Circuit's decision reflects some disagreement among the lower courts regarding application of the unmistakability principle in the context of the goodwill/contract litigation. Pet. 16-17. Indeed, it is curious -- and revealing -- that the leading illustration of the claimed "conflict" among the circuits given by the government is *Charter Federal Savings Bank v. OTS*, 976 F.2d 203 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1643 (1993). In that case the Fourth Circuit, after pointedly observing that "our case involves no written expressions of intent to contract nor any written contract between the parties," specifically refused to find that the thrift had *any* contract rights against the government. *Id.* at 211. Most importantly, the *Charter* court *expressly distinguished* the *Glendale*, *Statesman* and *Winstar* cases on precisely this basis. *Id.* at 211 n.11.

Guaranty Financial Services, Inc. v. Ryan, 928 F.2d 994 (11th Cir. 1991), also poses no conflict with the decision below because in that case the Eleventh Circuit rejected contract-based claims on the basis of a particular and dispositive contract provision -- "it being *expressly understood* that subsequent amendments to such regulations may be made and that *such amendments may increase or decrease the Acquiror's obligation under this Agreement*." *Id.* at 999. Thus, the contract in *Guaranty*, far from unmistakably securing the thrift's right to use goodwill, instead "unambiguously" and "unmistakably" "warned Guaranty that the rules might later change to Guar-

anty's detriment." *Id.*[10] *Charter* and *Guaranty* are thus fully consistent with the Federal Circuit's contract interpretation ruling in this case; they simply involved different facts and, consequently, different contract constructions and results.[11]

d. The government is thus doubly wrong to suggest that the Federal Circuit refused to apply the unmistakability doctrine because this is a monetary relief case. *See* Pet. 15-16. The Federal Circuit plainly *did* apply well-established unmistakability principles in construing Glendale's contract and did not even mention the monetary/injunctive relief distinction in the course of its contract interpretation discussion. *See* Pet. App. 17a-22a. Rather, the Federal Circuit addressed that distinction only in the course of rejecting the government's argument that the Court's construction of the contract would somehow contravene the government's "sovereign power to legislate." *Id.* at 37a ("Money damages, in contrast to injunctive relief, present little threat to the government's sovereign powers other than the obvious financial incentive to honor its contracts."). Thus, despite the government's attempt to engineer a conflict on this point, the Federal Circuit's construction of Glendale's contract (like that of the

[10] *Guaranty* illustrates vividly, as the Court of Federal Claims emphasized, that when the government wanted to make its contractual promises to thrifts subject to changes in laws or regulations, it "knew exactly how to [do so] when that was its intent." Pet. App. 129a ("The government in fact negotiated for that right in some cases.").

[11] The Federal Circuit's decision in this case is also fully consistent with both *RTC v. FSLIC*, 25 F.3d 1493 (10th Cir. 1994) and *Carteret Savings Bank v. OTS*, 963 F.2d 567 (3d Cir. 1992). *See* Pet. 17. In *RTC*, the Tenth Circuit concluded that various contemporaneous documents both "create[d] one contract" and were "wholly unambiguous" regarding the agreed treatment and amortization of goodwill; the court therefore affirmed summary judgment for the thrift plaintiffs on their contract claims. 25 F.3d at 1500. In *Carteret*, the Third Circuit specifically declined to reach the issue of contract construction. 963 F.2d at 574; *see also id.* at 573 (noting that "OTS took the position that we need not reach the issue whether Carteret had any contracts with the government regarding the treatment of goodwill").

Court of Federal Claims) is in fact completely faithful to what the government asserts is "this Court's consistent treatment of the unmistakability doctrine as a principle governing contract *interpretation*, not contract *relief*." Pet. 15-16.[12]

2. The government next requests that the Court review "the Federal Circuit's conclusion that the then-existing thrift regulators had the authority to enter into contracts *binding* the government not to apply new statutory capital requirements." Pet. 19 (emphasis added). Here again, the Federal Circuit reached no such conclusion, and indeed Glendale made no such claim, as both courts below emphasized repeatedly. *See, e.g.*, Pet. App. 192a ("plaintiffs are not claiming that the government contractually bound Congress not to change its regulations"); *id.* at 38a ("Congress was always free to deem supervisory goodwill a bad idea and legislate it out of existence."); *id.* at 135a ("Whether an agency has the power to bind Congress is a false issue in all of the *Winstar* cases."). Nevertheless, "while Congress' power to regulate is not impaired, the government may be compelled to pay for the results of its actions, especially when

[12] In the courts below, the government sometimes advanced an "unmistakability-plus" doctrine, claiming that government contract commitments are not enforceable unless the contract, in addition to stating a substantive promise, also expressly and separately forbids a breach of that promise through subsequent legislative or regulatory change. *See* Pet. App. 143a. The government evidently has abandoned that claim, which is not included in any of the "questions presented" in the petition. In any event, the government's second-promise theory would have rendered illusory a wide variety of federal and state government contracts (including government bonds), since it would be at best a very rare case where such a contract would satisfy the two-promise requirement. That theory also would require this Court to overrule *Lynch*, *Perry* and a long line of other decisions upholding government contract rights in the face of subsequent conflicting laws, including *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), *W.B. Worthen v. Kavanaugh*, 295 U.S. 56 (1935), *Murray v. Charleston*, 96 U.S. 432 (1878), *Jefferson Branch Bank v. Skelly*, 66 U.S. (1 Black) 436 (1862), *Piqua State Branch v. Knoop*, 57 U.S. (16 How.) 369 (1854) and *New Jersey v. Wilson*, 11 U.S. (7 Cranch) 164 (1812).

in doing so the government actually is paying because it received a benefit." *Id.* at 37a, 192a.

In challenging this logic -- the validity of which underlies the very existence of the Court of Federal Claims and its Tucker Act jurisdiction, *see* Pet. App. 138a-139a, 172a -- the government acknowledges that the authorizing statutes at the time of Glendale's 1981 merger with Broward specifically conferred upon FSLIC and the Bank Board "the power '[t]o make contracts,' [and] to extend assistance to acquirors of insolvent FSLIC-insured thrifts." Pet. 20-21. It also concedes that these provisions "establish that FSLIC had the authority to enter into assistance agreements." *Id.* at 21.[13] The government contends, however, that these provisions "do not grant FSLIC or the Bank Board the authority to *commit* Congress not to modify the governing statutes." *Id.* (emphasis added). This is a straw man. Glendale *does not claim* that its contract "committed" Congress to "refrain" from doing anything. Indeed, the government already has imposed new capital requirements eliminating the use of supervisory goodwill, and Glendale has complied with those new requirements, albeit at great financial loss. Glendale seeks here only to be compensated for the consequences of the government's refusal to honor its clear and unmistakable contract promise. That claim quite simply does not implicate the "fundamental principles governing the exercise of legislative power" urged upon the Court by the government. *Id.* at 19.

The government's real argument is that government agencies cannot -- at least "absent the most explicit grant of authority

[13] The government's suggestion that FSLIC nevertheless lacked authority to enter into the Glendale agreement because of the statutory provision that assistance could not exceed the cost of liquidation, Pet. 21 n.7, is nonsense. Among other things, it is undisputed that the cost of liquidating Broward would have been *far* in excess of the non-cash assistance the government provided in its agreement with Glendale. Glendale's contract *saved* the government more than three quarters of a billion dollars, by the government's own estimate.

by Congress," and perhaps not even then, *see* Pet. 19 -- enter into contracts that entitle the promisee to monetary relief following legislative or regulatory change. This radical proposition, if accepted, would render illusory *all* existing government contract obligations because no statute conferring contracting authority, such as that involved in this case, ever "explicit[ly] grant[s]" the contracting officials specific power to "bind" Congress. In five years of litigation the government has never cited such a statute, and Glendale has never found one.

There is no reason for the Court to address the government's far-reaching proposition, however, because the government does not (and cannot) cite a single case supporting its position.[14] This Court's precedents, in fact, are directly to the contrary. At least since *Lynch v. United States*, 292 U.S. 571 (1934), the Court has upheld contract claims against the United States in the face of subsequent conflicting laws without even looking for (and, *a fortiori*, without finding) any express statutory authority to "bind" governmental action by contract.[15] Indeed, in *Perry v.*

[14] Not even the two dissenters below suggested that such a requirement exists, and the cases cited by the government certainly do not so hold. A number of those cases involved no contract at all, *e.g.*, *Welch v. Cook*, 97 U.S. 541, 542 (1879); *cf. Wisconsin & M. Ry. v. Powers*, 191 U.S. 379, 386-87 (1903) (finding no contract, but explicitly recognizing that a bargained for exchange *would* bind the state), or no government contract, *e.g.*, *National R.R. Passenger Corp. v. Atchison, T. & S.F. Ry.*, 470 U.S. 451, 465-471 (1985) (contract between private parties); *Veix v. Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32, 38-40 (1940) (same). Others involved contracts expressly reserving the sovereign's power to impose subsequent laws. *See, e.g.*, *North Am. Commercial Co. v. United States*, 171 U.S. 110, 125 (1898). Still others involved Contract Clause holdings supportive of Glendale's claims. *See, e.g.*, *United States Trust Co. v. New Jersey*, 431 U.S. 1, 24 (1977) ("Whatever the propriety of a State's binding itself to a future course of conduct in other contexts, the power to enter into effective financial contracts cannot be questioned.").

[15] Cases construing the Contract Clause are to the same effect. *See, e.g.*, *United States Trust Co.*, 431 U.S. at 23-24; *Murray v. Charleston*, 96 U.S.

United States, 294 U.S. 330, 350 (1935), the Court was confronted with *precisely* the same argument the government now offers here: that because one Congress cannot restrict a future Congress from exercising its constitutional powers, Congress is always free to alter or abolish contractual commitments made under earlier legislation. *Id.* In response the Court in *Perry* first observed: "[w]e do not so read the Constitution." *Id.* at 353. It then elaborated: "The argument . . . is in substance that the Government cannot by contract restrict the exercise of a sovereign power. *But the right to make binding obligations is a competence attaching to sovereignty*." *Id.* (emphasis added).[16]

Petitioner has suggested no reason for the Court to revisit this long-settled principle in this case, and there is none. The Federal Circuit properly dismissed the government's attempted assault on federal contract rights with the observation that "[t]he terms of a government contract, like any contract, do not change with the enactment of subsequent legislation absent a specific contractual provision providing for such a change." *Id.* at 37a.

432, 449 (1878); *United States ex rel. Von Hoffman v. City of Quincy*, 71 U.S. (4 Wall) 535, 543, 554-55 (1866); *Jefferson Branch Bank*, 66 U.S. (1 Black) 436, 448-50 (1862); *Hall v. Wisconsin*, 103 U.S. 302, 305 (1850).

[16] It was in this context that the Federal Circuit correctly distinguished between cases involving monetary claims and those seeking injunctive relief -- the latter by definition *do* impinge on Congress' power, *see* Pet. App. 36a-38a; the former do not. Thus, in the goodwill/contract cases involving injunctive relief claims, the courts of appeals have uniformly denied that relief. *See, e.g., Carteret Sav. Bank v. OTS*, 963 F.2d 567, 577-79 (3d Cir. 1992) and cases cited therein. By contrast, in all of the goodwill/contract cases decided to date involving monetary relief claims (including Glendale's case and the other two cases consolidated here), the thrift plaintiffs have prevailed. *See RTC v. FSLIC*, 34 F.3d 982 (10th Cir. 1994); *Far West Fed. Bank v. Director, OTS*, 787 F. Supp. 952 (D. Or. 1992), *appeal docketed sub nom. Trinity Ventures, Ltd. v. FDIC*, Nos. 92-35597, -36535 (9th Cir. July 7, 1992); *see also Transcapital Fin. Corp. v. Director, OTS*, 44 F.3d 1023, 1026 (D.C. Cir. 1995) (emphasizing that its analysis of injunctive claims "has no bearing . . . on the merits of Appellant's claim for *compensation* in the Federal Court of Claims [sic]").

3. The government lastly contends that the Federal Circuit "erred" in concluding that the "sovereign acts" doctrine does not excuse the government's otherwise clear breach of its express contract obligations in these cases. This contention as well is wrong; the Federal Circuit's holding on this point is fully consistent with this Court's precedent, with the application of the sovereign acts doctrine by the Federal Circuit and the Court of Federal Claims (and their predecessors) in a variety of recurring federal government contract contexts, and with the decision of the only other court of appeals to have addressed the doctrine's application to a contract-based claim under FIRREA.

a. The sovereign acts doctrine excuses government liability for breach of contract only where a general, *unrelated* sovereign act *incidentally* affects a contract with the government. *See Horowitz v. United States*, 267 U.S. 458 (1925).[17] Significantly, the government does not dispute that the sovereign acts doctrine is inapplicable where the claimed sovereign action targets government contracts; such acts are by definition neither incidental nor unrelated. *See* Pet. 22-24. Rather, the government quarrels only with the Federal Circuit's conclusion that "the FIRREA provisions at issue here [did] target[] thrifts that had undergone supervisory mergers, financed in part with supervisory goodwill," Pet. App. 45a. *See* Pet. 23-24. The Federal Circuit found FIRREA's targeting of goodwill contracts clear from the terms of the statute, which "plainly singles out thrifts that underwent supervisory mergers for special treatment," Pet. App. 44a, and from the legislative history, which shows that

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[17] The doctrine's rationale is that the government should not be liable for non-performance as a result of its action as sovereign if a private contracting party would not be liable for non-performance as a result of that same sovereign action; that is, private contracting parties should "gain nothing by having the United States as their defendants." *Horowitz*, 267 U.S. at 461. Thus, in a situation where one private party cannot recover damages from another, a private party contracting with the government cannot recover either; the converse is likewise true.

Congress was well aware both that contracts like Glendale's existed and that the new capital requirement would abrogate those contracts. *Id.* at 43a-44a. The government does not dispute those facts.[18]

FIRREA's requirement that Glendale deduct the goodwill from its capital is, therefore, not an "incidental" and "unrelated" sovereign act; Congress took dead aim at these contracts and specifically decided to extinguish them. In these circumstances, the Federal Circuit's holding that the sovereign acts doctrine does not excuse the government's deliberate, direct and "targeted" repudiation of its prior contractual commitments to Glendale regarding use of goodwill as capital was clearly correct. As the court explained, "[t]he government has plainly sought to render its own performance impossible. This is not a public and general act. The sovereign acts doctrine does not apply." Pet. App. 45a. In so ruling, the Federal Circuit reached exactly the same conclusion the Tenth Circuit did in *RTC v. FSLIC*, the only other circuit decision that has addressed the government's sovereign acts defense under FIRREA.[19] No case cited by the government,

[18] Indeed, the government *cannot* contend otherwise since it has argued in other cases that "FIRREA was *designed* to abrogate any pre-existing agreements . . . authorizing the greater use of supervisory goodwill as regulatory capital." *Carteret Sav. Bank v. OTS*, 963 F.2d 567, 576 (3rd Cir. 1992) (emphasis added); *see also id.* at 579-80 (agreeing with holdings of the Sixth and Ninth Circuits that "the legislative history of FIRREA does clearly indicate that Congress intended to abrogate prior agreements to treat supervisory goodwill as capital").

[19] *RTC v. FSLIC*, 25 F.3d 1493, 1501 (10th Cir. 1994) ("The limits of this immunity are defined by the extent to which the government's failure to perform is the result of legislation targeting a class of contracts. If Congress enacts legislation targeted to abrogate pre-existing contract obligations the government owes to private citizens, the government may be properly sued for breach.").

and none that Glendale is aware of, has ever upheld the sovereign acts defense in such circumstances.[20]

b. The Federal Circuit also properly recognized that the sovereign acts defense does not lie where the claimed sovereign action abrogates a *central* contractual commitment of the government. Pet. App. 45a ("We know of no authority for [the] position that the government has a sovereign right to disavow its contractual obligations through comprehensive national legislation."). As the Federal Circuit's predecessor held in *Freedman v. United States*, 320 F.2d 359 (Ct. Cl. 1963), "the doctrine . . . laid down in *Horowitz v. United States*, . . . does not relieve the Government from liability where it has specially undertaken to perform the very act from which it later seeks to be excused." *Id.* at 366 (citation omitted).[21]

That is precisely what happened here. The contracting parties expressly intended and agreed that Glendale could include the goodwill asset in regulatory capital and amortize it

[20] The government's principal argument in response -- that because Glendale and the other contracting thrifts were granted a 'partial exception" from "more generally applicable restrictions," the restrictions themselves *were* public and general, *see* Pet. 23-24 -- is specious. That Glendale and the other affiliated thrifts were permitted to use a declining fraction of the contracted-for goodwill to meet certain capital standards (but not others) during a brief phase-out period does not, and cannot, negate the fact that the goodwill covered by Glendale's contract (and by other similar contracts) was targeted *both* by Congress *and* by FIRREA's express terms (and, for that matter, by the implementing regulations). Nor does it negate the fact that the new capital requirements hit their intended targets and thereby directly contravened the government's previous contract commitments.

[21] This has been the rule since at least *Bostwick v. United States*, 94 U.S. 65 (1877). In *Bostwick*, the Court distinguished between damage done to property occupied by the Army in the absence of a lease and that done after a lease was executed by the government. The former was held to be an uncompensable act of the sovereign; the latter a compensable "breach of contract." *Id.* at 68-69. As the Court emphasized, "All depends upon the contract." *Id.* at 69.

over 40 years. That promise was essential to make the Broward merger financially possible, and it saved the United States more than $783 million. Then, after Glendale had fully performed, the government required Glendale to "deduct" the goodwill from its capital, while the government retained the $783 million-plus benefit (and Glendale the Broward liabilities). The sovereign acts doctrine has *never* been applied in such circumstances. To the contrary, long before *Freedman* the Court of Claims recognized that even a concededly sovereign act is compensable when the act in question contravenes a specific contractual undertaking by the government.[22] The same rule has been applied by successor courts (including the Federal Circuit) ever since.[23]

As the Federal Circuit recognized, this long-established understanding of the sovereign acts doctrine is reaffirmed by this Court's decisions in *Perry* and *Lynch*. Pet. App. 45a. Both cases involved legislation that was "public and general" -- in *Perry*, the statute effected a sweeping reform of the monetary system that affected "every obligation," government and private, *see Perry*, 294 U.S. at 349 n.1, and in *Lynch*, the statute broadly repealed "all laws granting or pertaining to yearly renewable term insurance," *Lynch*, 292 U.S. at 575. Yet, in both cases, this Court held that the government was not absolved of liability for

[22] *See, e.g., Sunswick Corp. v. United States*, 75 F. Supp. 221, 228 (Ct. Cl.), *cert. denied*, 334 U.S. 827 (1948) ("We know of no reason why the Government may not by the terms of its contract bind itself for the consequences of some act on its behalf which, but for the contract, would be nonactionable as an act of the sovereign.").

[23] *See, e.g., Hills Materials Co. v. Rice*, 982 F.2d 514, 516 n.2 (Fed. Cir. 1992) ("the doctrine certainly does not prevent the government as contractor from affirmatively assuming responsibility for specific sovereign acts"); *see also Amino Bros. Co. v. United States*, 372 F.2d 485, 491 (Ct. Cl.), *cert. denied*, 389 U.S. 846 (1967) ("The government cannot make a binding promise that it will not exercise a sovereign power, but it can agree in a contract that if it does so, it will pay the other contracting party the amount by which its costs are increased by the Government's sovereign act.").

the legislation's direct abrogation of the government's obligations under the contracts involved -- in *Perry* a government bond payable in gold, and in *Lynch* a war risk insurance policy. *Perry*, 294 U.S. at 352-53; *Lynch*, 292 U.S. at 577-78.[24]

The sovereign acts doctrine has *never* been applied, as the government argues here, to excuse its outright refusal, following a private contracting party's full performance of its obligations, to honor the commitment which formed the central consideration for the contract. In the same circumstances a private party would, of course, be liable for breach of contract. The decision below was thus in accord with longstanding precedent, and the government has neither pointed to any conflict in the circuits nor claimed that the lower court decisions applying sovereign acts principles reflect any confusion requiring this Court's guidance. There is, accordingly, no occasion for this Court's review of the issue.[25]

4. Finally, there is no merit to the government's concluding argument that the Court should take this case (a) because there are approximately 100 other pending cases involving

[24] The government's attempt to distinguish these cases on the theory that they hold only that the government may not repudiate its own debts "solely to save money," Pet. 23, is doubly flawed. First, the statutory reform of the American monetary system at issue in *Perry*, for example, cannot fairly be characterized as an attempt by the government merely "to save money." Second, even if accepted, the argument would not avail the government here. The government's repudiation of the goodwill contracts was undertaken to reduce future claims on the government's deposit insurance fund, and thus fails even this government test.

[25] The government's sovereign acts defense does not in any event defeat Glendale's claims for a constitutional taking or for frustration of purpose, mistake or other quasi-contractual relief. The Court of Federal Claims deferred decision on these claims in light of its ruling on the breach of contract claim. *See* Pet. App. 107a. The availability of such alternative grounds for recovery provides even further reason for the Court to decline review of this issue. *See Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 183-84 (1959).

thrifts that booked goodwill or capital credits totalling $10 billion, Pet. 24, or (b) because the courts of appeals have not consistently applied the unmistakability doctrine in *other* federal contract contexts, *id.* at 24-25.

a. The amount of money potentially at issue in a case should not be, and has never been, considered an appropriate reason for this Court to exercise its powers of review or to craft particular rules of decision. *See, e.g., O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048, 2055 (1994) (noting that "there is no federal policy that the [deposit insurance] fund should always win" and that "[o]ur cases have previously rejected [such] 'more money' arguments") and cases cited therein.[26] Indeed, a contrary rule implies a threshold above which the Federal Circuit cannot be entrusted to perform its role as the primary appellate arbiter of contract disputes involving the government.

Moreover, the liability ruling in Glendale's case does *not* resolve reflexively the liability issues in any of the other pending cases or guarantee large damage awards to those thrifts. The decisions of the Federal Circuit and the Court of Federal Claims in this case involved careful interpretations of the particular terms of specifically negotiated contracts. As the courts below noted, there was a great deal of variation in the individual deals that FSLIC and the Bank Board entered into and approved over the years. Pet. App. 166a ("the terms of the separate agreements negotiated [with] the FHLBB and FSLIC substantially differ"). Indeed, that variation is demonstrated by the very cases on which the government relies, including *Charter* and *Guaranty*.

Each of these cases thus will have to be evaluated and decided on the basis of its own facts and its own contract

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[26] *See also United States v. Turecamo of Savannah, Inc.*, 64 U.S.L.W. 3416 (U.S. December 11, 1995) (No. 95-525) (denying *certiorari* despite United States' argument, *see* Petition for a Writ of Certiorari at 13, *Turecamo*, that the decision below extended lien liability "to contracts for supplies, service, and repairs on more than 1000 public vessels involving millions of dollars annually").

documents. The thrifts in some cases will likely succeed in establishing enforceable contract rights; in others, they may not. And in any case, establishing enforceable contract rights does not translate automatically into substantial damages; as the government concedes, Pet. 25, the circumstances of each thrift vary greatly. The outcome of that process is too uncertain to serve as an appropriate basis for this Court's exercise of its certiorari discretion.[27]

b. The government is also incorrect in suggesting that the decisions of the circuits involving *other* kinds of government contracts reflect confusion concerning the circumstances in which the unmistakability requirement applies. Pet. 24-25. Indeed, far from "refus[ing] to apply" the unmistakability principle, *id.* at 24, the Federal Circuit in *Hughes Communications Galaxy, Inc. v. United States*, 998 F.2d 953 (Fed. Cir. 1993), explicitly found that requirement satisfied in the particular circumstances of that case:

> Under our interpretation of the contract, we have no trouble concluding that Article IV obligates the government . . . in language which more than satisfies the "unmistakable terms" requirement.

Id. at 958. The other cases relied upon by the government are entirely consistent.[28]

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[27] Nor is it likely that denial of the government's petition will spawn a flood of additional suits. FIRREA and the OTS regulations were adopted in 1989. The statute of limitations for Tucker Act suits against the government is six years. 28 U.S.C. § 2501 (1994).

[28] In *Education Assistance Corp. v. Cavazos*, 902 F.2d 617 (8th Cir.), *cert. denied*, 498 U.S. 896 (1990), the court found that application of subsequent legislation to a contract with the Department of Education did not breach the contract because, unlike in *Hughes Communications* and in this case, "[i]n its agreements with the Secretary, EAC agreed to be bound by 'all changes in the Act or regulations in accordance with their respective effective dates.'" 902 F.2d at 628. Similarly, in *Western Fuels-Utah, Inc. v. Lujan*, 895 F.2d 780 (D.C. Cir.), *cert. denied*, 498 U.S. 812 (1990), the court approved application of congressionally specified royalty rates pursuant to a

At bottom, these cases -- like the present one -- simply reflect the efforts of the courts involved to determine, in the words of the *Hughes* court, "how liability for certain contingencies was allocated by the contract." *Hughes Communications*, 998 F.2d at 958. That the government wins some cases and loses others is not surprising. The government's unhappiness with a particular court's determination of the specific contract terms and circumstances in a given case, however, provides no reason for this Court's review. Indeed, to the extent the government is dissatisfied with the allocation of risk it has been found to have contractually accepted in a given class of contracts -- or in all contracts -- it retains the power to avoid that consequence by drafting and insisting upon an appropriate clause in contracts it enters into in the future. That power negates any substantial adverse precedential effect that might otherwise argue for this Court's attention.

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clause in the lease which permitted readjustment of the royalties at 20-year intervals and explicitly provided that the readjustment rights were subject to laws in effect at the time of the readjustment. 895 F.2d at 788.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JERRY STOUCK*
JOE G. HOLLINGSWORTH
DONALD W. FOWLER
Spriggs & Hollingsworth
1350 I Street, N.W.
Washington, D.C. 20005
(202) 898-5800

CARTER G. PHILLIPS
RICHARD D. BERNSTEIN
Sidley & Austin
1722 I Street, N.W.
Washington, D.C. 20006
(202) 736-8000

December 22, 1995

Attorneys for Respondent
Glendale Federal Bank, FSB

* Counsel of Record